The Attorney General of Texas

November 13, 1981

This Opinion Overrules Opinion
ORD-288
Withdrawn

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Affirmative Action Employer

Mr. Donald J. Walheim
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Open Records Decision No. 288

Re: Whether report concerning former high school principal is available to him under the Open Records Act

Dear Mr. Walheim:

Your request for our decision under the Open Records Act, article 6252-17a, V.T.C.S., concerns a report prepared by an assistant superintendent of the Edgewood Independent School District and submitted to the district superintendent. This report summarized the results of an investigation into the manner in which one of the district's high school principals handled various revenues entrusted to his care. It also discussed the principal's overall performance.

Within a few days of the submission of this report, the principal in question resigned. You advise that he now intends to sue the district and/or certain district personnel as well. You further advise that the district is considering suing him, and that it is "very probable" that the entire matter will end up in the hands of the Bexar County District Attorney.

The former principal has requested a copy of this report, which, we understand, he has not yet seen. Citing sections 3(a)(3) and 3(a)(11) of the Open Records Act, you contend that the district need not comply with this request.

Section 3(a)(3) exempts from public disclosure:

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

In support of your contention that you reasonably believe that the former principal intends to sue the district, you have submitted affidavits from nine individuals who attested that they have heard him voice this intent on different occasions. These affidavits also indicate that he has retained an attorney, presumably for the purpose of carrying out his threat. You further advise that because school district funds are involved, the district intends to pursue civil and/or criminal litigation against him. You have made the required determination that this report should be withheld under section 3(a)(3).

The mere chance of litigation is not sufficient to invoke section 3(a)(3). Open Records Decision Nos. 183 (1978); 139 (1976); 80 (1975). The exception is applicable, however, where "litigation is pending or reasonably anticipated in regard to a specific matter as opposed to a remote possibility among a group or classification." Open Records Decision No. 139, supra. (Emphasis added). See also Open Records Decision Nos. 183, supra; 126 (1976); Attorney General Opinion H-483 (1974). On the strength of the information at hand, we conclude that litigation may reasonably be anticipated in this instance and, therefore, that this standard has been met.

But this does not end our inquiry. Open Records Decision No. 200 (1978) dealt with a question similar to yours. There, a school employee requested all information in his personnel file "or otherwise held" by the school district which "touch[ed] upon the quality of his performance." The district granted the employee access to his personnel file, but sought to withhold from him, inter alia, a memorandum from the superintendent to the school board which described a meeting between the superintendent and the employee, made certain recommendations, and discussed the employee's work over a period of time. The district based its claim that it need not release this report to the employee upon section 3(a)(3).

With respect to this claim, the opinion concluded as follows:

> We do not believe that the 3(a)(3) exception is applicable to this memorandum even though there may be a reasonable anticipation of litigation. We do not believe that this exception permits you to deny to the employee his clear right under section 3(a)(2) to inspect memoranda such as this. See Open Records Decision Nos. 148 (1976); 90 (1975); 55 (1974) (employee has right to inspect memoranda making evaluations and recommendations concerning his employment relationship).

Section 3(a)(2) excepts from public disclosure:

> information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Also included in section 3(a)(2), however, is this proviso:

> provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

You contend that the report in question is not part of the former principal's personnel file. The information contained in the report, however, clearly relates to his employment relationship with the school district, inasmuch as it details his involvement in and responsibility for, various financial problems and assesses his overall performance. It is therefore within his personnel file within the meaning of section 3(a)(2). See Open Records Decision Nos. 230 (1979); 200 (1978); 133 (1976); 115 (1975).

Were we to adhere to Open Records Decision No. 200, supra, we would conclude that section 3(a)(3) does not authorize the district to withhold this report from the former principal. As the above quotation indicates, that decision in effect held that in an instance of conflict between the section 3(a)(2) proviso and section 3(a)(3), the former prevails.

Open Records Decision No. 200 is an example of prior decisions of this office which have taken the position that the section 3(a)(2) proviso creates a "special right of access" on the part of employees which entitles them to personnel information otherwise excepted from disclosure by section 3(a). In some decisions, this "special right of access" rationale has resulted in the application of a balancing test whenever the proviso comes into conflict with section 3(a) exemptions. See, e.g., Open Records Decision Nos. 172 (1977) (sections 3(a)(1) and 3(a)(2) balanced); 133 (1976) (sections 3(a)(8) and 3(a)(2) balanced). More often, it has been read to provide an affirmative right of access similar to that accorded students by section 3(a)(14). Open Records Decision Nos. 218, 210, 191 (1978); 115, 90 (1975); 55, 31 (1974). In our opinion, however, these prior decisions have overlooked the structure of section 3(a)(2). The proviso is actually only an exception to the general section 3(a)(2) exemption covering information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of an employee's personal privacy. Thus, Open Records Decision No. 200 was consistent with other decisions granting a special status to section 3(a)(2) of the act.

We are no longer prepared to accept the view that the 3(a)(2) proviso overrides the (3)(a)(3) exemption. Section 3(a)(3) prevents governmental entities from possibly having to compromise their position in pending or anticipated litigation or in settlement negotiations by having to divulge information relating thereto. It ensures that one who is or may be involved in litigation with the

entity will have to obtain related information in the hands of the entity through the discovery process, if at all. To hold that section 3(a)(2) affords an employee a "special right to access" which automatically entitles him to information which legitimately falls within section 3(a)(3) merely because the information is in his personnel file is, quite obviously, to defeat the very interests which section 3(a)(3) serves to protect. We do not believe the legislature could have intended to create a litigation exception and, at the same time, devise a means whereby that exception would effectively be nullified.

We therefore conclude that the section 3(a)(2) proviso does not entitle a former employee of a governmental entity to information which the entity may withhold from the general public under section 3(a)(3). We overrule Open Records Decision No. 200 to the extent that it conflicts with this decision.

For the foregoing reasons, we conclude that this report may be withheld from the former principal at this time under section 3(a)(3). Our decision renders it unnecessary for us to address your section 3(a)(11) claim.

Very truly yours,

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